In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 193

SAM HOOVER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of four counts of filing false income tax returns in violation of Section 7206(1) of the Internal Revenue Code of 1954.[1] He was fined $2,500 and sentenced to two years' imprisonment on each count, the sentences to be served consecutively (R. 1415–1416). On appeal, the conviction was affirmed (Pet. App. A; 358 F. 2d 87).

[1] The evidence showed that petitioner, an attorney, understated his income from legal and bonding fees by issuing false receipts for amounts less than those actually received and reporting only the amounts shown on the receipts as income (R. 571–606). He also failed to report his share of the proceeds of various robberies, burglaries and thefts, which he planned while others did the actual work (R. 79–93, 292–307, 502–507).

223-093—66

Petitioner seeks certiorari on the sole ground that the trial court committed plain error in giving the following instruction (R. 1191):

> So what are the elements of the offense with which the defendant is charged? They are these: It must be shown that there was a willful making and subscribing, that is, signing of an income tax return by the defendant. *It is conceded that that was the case in all four years.* Second, that the returns must contain a written declaration that it is made under the penalty of perjury. That also is admitted for all four years. And third, the maker must not believe that the return was true and correct as to every material matter, and that this must have been knowingly and wilfully done. [Emphasis supplied.]

There is no merit in the contention that the italicized sentence withdrew the element of wilfulness from the jury's consideration. That sentence indicated only that there was no dispute as to whether petitioner signed the tax returns in question.

The challenged sentence must be read in context. The paragraph of instructions immediately following the one quoted above reads as follows (R. 1191–1192):

> Those are the elements which the Government must prove to your satisfaction beyond a reasonable doubt as to each of the counts in question. You will notice that the mere omission to include all of one's income is not necessarily criminal. An honest mistake, an omission of income resulting from an accident, from poor bookkeeping, from a mistake by one's accountant, perhaps, is not a violation of

> the law. To be a violation, there must be a failure to report in a material respect, and as I have said, it must have been done wilfully and knowingly, that is, the defendant must have been aware that he was not including these items which he knew should have been included in his return.

Taken as a whole, the court's charge made it abundantly clear that wilfulness was an essential element of the offense, which the jury had to find before it could return a verdict of guilty, and that the existence of wilfulness in this case was in no way conceded by the defense.

As the court of appeals correctly pointed out, "No objection to the Court's charge was made and it can hardly be argued that the jury was affected to the detriment of the [petitioner] by this charge when it was obvious that none of the experienced trial lawyers representing the [petitioner] were so affected" (Pet. App. 13).

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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